SARAWAK SHELL BHD & ANOR

v.

MENTERI KEWANGAN

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-118-99]
24 AUGUST 2000

REVENUE: *Service tax - Taxable service - Management services provided under a Product Sharing Contract to joint venture partners - Whether taxable under s. 7 Service Tax Act 1975 - Whether merely incidental to main business*

REVENUE: *Service tax - Scope of enabling provision - Meaning of "carries on business" - Section 7 Service Tax Act 1975 - Interpretation of revenue law cases*

This is an application for an order of *certiorar*i to quash the decision of the respondent rejecting the appeal of the applicants under s. 50(2) of the Service Tax Act 1975 ('STA 1975'). The issue to be determined by the court is whether the applicants carry on the business of providing taxable service for the purposes of the STA 1975 within the scope of s. 7 of STA 1975.

The applicants were involved in providing management services under a joint venture arrangement with several Production Sharing Contractors and related upstream companies. The costs of services provided by each partner of the joint venture were shared between the contractors on a "no profit no loss" basis and without any mark-up or profit. They did not provide such services to any other third parties.

As such, the applicants claimed that they were not carrying on the business of providing management services and should not be subjected to service tax in providing such services. The services provided by the applicants were merely "incidental" to the applicants' business of exploring and producing crude oil and natural gas.

The respondent, on the other hand, relied on the interpretation of UK VAT legislation.

Held:

[1] The crux of the case turns on the interpretation of s. 7 of STA 1975, in particular the meaning of "carries on business". Management services provided under the Product Sharing Contract to joint venture partners were incidental or in the course of the applicants' business, which was the exploration and production of crude oil and natural gas embarked upon to derive profit.

[2] Cases show that there are four relevant factors in determining whether a company is carrying on a particular business for the purposes of triggering the application of the enabling provision: (i) profit motive; (ii) services provided to the public; (iii) activities which are part or in the course of a business constitute separate businesses; and (iv) principal or primary object for which the company was formed as set out in the memorandum of association.

[3] Service tax is not, and neither can the STA 1975 be read as, a tax on every conceivable activity carried on by a legal entity. Otherwise the words "carries on business" of providing taxable services would be mere surplusage. It is clear that the STA 1975 creates a restrictive charge to tax by way of an exclusionary scope of tax whilst UK VAT legislation creates a broader charge to tax by way of an inclusionary scope of tax.

[4] Any attempt to refer to UK VAT legislation is false as our STA 1975 is worded very differently and VAT and service tax are conceptually and schematically different. The effect of the respondent's contention, by imposing the words in a UK enactment into our STA 1975, is that there is a legal ambiguity in our s. 7 that is capable of two or more meanings. In this regard the law construes an ambiguity in favour of the taxpayer.

[5] Apart from the above principles of interpretation, the rule in *Pepper v. Hart* and the insertion of s. 17A into the Interpretation Acts 1948 and 1967 requires the court to consider the purpose of legislation even if such purpose is not expressed in the statute. The clear purpose of legislation was to make "carrying on business" entrenched in the service tax legislation.

[6] The following principles should be borne in mind in interpreting tax cases: (i) there is no room for intendment in tax legislation – one can only look fairly at the language used; (ii) tax cannot be imposed in the absence of clear and unambiguous words; (iii) any ambiguity in the meaning of a statute must be construed in favour of the taxpayer; (iv) the respondent must bring the taxpayer within the letter of the law to impose tax regardless of however apparently within the spirit of the law the case

might otherwise appear to be; (v) the respondent cannot tax by analogy but by statute; and (vi) it is not the function of the court of law to give to words a strained an unnatural meaning only to apply a taxing section which had the legislature thought of it, would have been covered by appropriate words.

[7] This was an appropriate case for an order of *certiorari* to quash the decision of the respondent, who had misdirected itself by relying on the words of the UK tax legislation to interpret a totally different concept and scheme of taxation on services in Malaysia.

[Order in terms of application allowed.]

Case(s) referred to:

A Lewis and Company (Westminster) Ltd v. Bell Property Trust, Ltd [1940] 1 Ch 345 ***(foll)***

American Leaf Blending Co Sdn Bhd v. Director General of Inland Revenue [1979] 1 MLJ 1 ***(refd)***

Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London [1993] 4 CLJ 307 ***(refd)***

Cape Brandy Syndicate v. IRC 12 TC 358 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 ***(refd)***

Dewan Perniagaan Bumiputra Sabah v. Ketua Pengarah Hasil Dalam Negeri [1996] 1 BLJ 397 ***(refd)***

Director General of Inland Revenue v. Kok Fai Yin Co Sdn Bhd (unreported) (MTKL Rayuan Cukai No 14-1-90) ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511 ***(refd)***

Foster v. Chief Adjudication Officer [1993] 2 WLR 292 ***(refd)***

Hj Abdul Ghani Ishak v. PP [1981] 2 MLJ 230 ***(refd)***

Johnson & Johnson Sdn Bhd v. Director General of Customs and Excise [1994] 3 CLJ 767 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***

Lord Fisher's case [1981] STC 238 ***(refd)***

Low Kok Wai v. PP [1994] 1 SLR 676 ***(refd)***

Mangin v. IRC [1971] AC 739 ***(refd)***

Morrison's Academy Case [1978] STC 1 ***(refd)***

National Land Finance Co-operative v. Director General of Inland Revenue [1993] 4 CLJ 339 ***(refd)***

Oriental Bank Corporation v. Wright [1880] 5 AC 842 ***(refd)***

Pepper (Inspector of Taxes) v. Hart and Related Appeals [1992] STC 898 ***(refd)***

Raffles City Ptd Ltd v. AG [1993] 3 SLR 580 ***(refd)***

Re Micklewait [1844] 11 Exch 452 ***(refd)***

Rolls v. Miller 27 Ch 71 ***(refd)***

Royal Exchange Theatre Trust Case [1979] STC 728 ***(refd)***

RV Warwickshire County Council ex p Johnson [1993] 2 WLR 1 ***(refd)***

Smith v. Anderson [1880] CA Vol XV 247 ***(refd)***

Stephens v. Mysore Reefs (Kangundy) Mining Co Ltd [1902] 1 Ch 745 ***(refd)***

Stubbings v. Webb [1993] 2 WLR 120 ***(refd)***
Tan Boon Yong v. Controller of Income Tax [1993] 2 SLR 48 ***(refd)***
Tanjong Jaga Sdn Bhd v. Minister of Labour and Manpower & Anor [1987] 2 CLJ 119 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 4(a), 33(1)
Interpretation Acts 1948 & 1967, s. 17A
Service Tax Act 1975, ss. 6, 7, 8, 9, 12, 42(1), 50(2)

Interpretation Act 1901 [Aust], s. 15

Other source(s) referred to:
Statutory Interpretation, Jim Evans, OUP, New Zealand 1989, pp 290-291

For the applicant - S Woodhull (KI Goh with him); M/s Shearn Delamore & Co
For the respondent - Azwarnida Affandi; FC

Reported by Yow Ting Fong

JUDGMENT

Faiza Tamby Chik J:

This is an application for an order of *certiorari* to quash the decision of the respondent in its letter dated 11 October 1999 whereby the respondent rejected the appeal made by the applicants uñder s. 50(2) of the Service Tax Act 1975 (hereinafter referred to as "STA") and upheld the decision of the Director General of Customs and Excise that services provided under Production Sharing Contracts are liable to service tax under STA. The facts in this case are by a letter dated 11 February 1998 (marked as exh. "GG1") written by the Chairman of Shell Malaysia Limited, which is a related company of the applicants, on behalf of the applicants to the respondent, it was requested that an exemption be granted by the respondent under s. 6 of the STA to Production Sharing Contractors, which include the applicants. The request for exemption was made to avoid any delay in the process of interpretation of the law. By a letter dated 27 July 1998 (marked as exh. "GG2") from MA Sivanesan of the Tax Analysis Division, on behalf of the Secretary General of Treasury addressed to Shell Malaysia Limited, the request to exempt service tax on management services for petroleum exploration and production companies was rejected by the respondent. By a letter dated 6 October 1998 (marked as exh. "GG3") the chairman of the applicants had written to the Director General of Customs to ask for a review and to elaborate in detail why the applicants should not be considered as taxable persons under s. 7 of the STA. This is because in production sharing contract environment in Malaysia, the costs of services are shared between the Production Sharing Contractors on a no-profit no-loss basis

with no mark-up or profit levied. By a letter dated 19 May 1999 (marked as exh. "GG4") the Royal Customs and Excise Malaysia (hereinafter referred to as "Customs Department") wrote to the chairman of the applicants to state that his appeal to be exempted from service tax on provision of management services was rejected. By a letter dated 1 July 1999 (marked as exh. "GG5") the chairman of the applicants had written to the Director General of Customs to place on record that exh. "GG3" was actually written pursuant to s. 50 of the STA and requested the Director General of Customs to review the matter again on the issue of the applicants' liability to service tax. By a letter dated 18 August 1999 (marked as exh. "GG6") the Customs Department had written to the chairman of the applicants to inform that all types of management services provided to group companies in oil and gas exploration and production and under Joint Operating Agreements or Production Sharing Contracts are subject to service tax and the applicants' appeal was rejected. By a letter dated 14 September 1999 (marked as exh. "GG7") the chairman of the applicants had written to the respondent to appeal against the decision of the Director-General of Customs in exh. "GG6" pursuant to s. 50 of the STA. By a letter dated 11 October 1999 (marked as exh. "GG8") the Ministry of Finance had replied to the chairman of the applicants to reject the appeal of the applicants. The applicants are not carrying on the business of providing management services. It is clear from the Memorandums of Association of the applicant companies (marked as exh. "GG9" and "GG10") and the Directors' Report in the statement of accounts of the 1st applicant company for the last two financial years (marked as exhs "GG11" and "GG12") that the applicant companies are in the business of exploration and production of crude oil and natural gas, the refining of crude oil and the manufacture of petroleum products. There is no Directors' Report for the 2nd applicant because it is a branch of a foreign company. As explained in the letter dated 1 July 1999 from the chairman of the applicants to the Director General of Customs and Excise, the letter of 6 October 1998, (exh. "GG3") was not an application for exemption under s. 6 of the STA but an application under s. 50 of the STA for the Director General of Customs to review the decision that services provided under Production Sharing Contracts are subject to service tax. As explained in exh. "GG3", the sharing of services and allocation of costs of services amongst joint venture partners in a Production Sharing Contract environment pursuant to a Joint Operating Agreement without any profit motive on a no-profit, no-loss basis should not be subject to service tax. The contents of Production Sharing Contracts and Joint Operating Agreements are substantially the same and sample copies of a Production Sharing Contract and a Joint Operating Agreement involving the 1st applicant company referred to in "GG11" are marked as exhs. "CG13" and "CG14" respectively.

It is submitted that s. 7 of the STA imposes service tax on a person who carries on the business of providing taxable service. As the applicants are not carrying on the business of providing management services, the mere provision of incidental management services by the applicants is not subject to service tax and therefore there is no basis for the respondent to state that management services provided by the applicants are included in the scope of charge to service tax consistent with s. 7 of the STA when no evidence has been tendered at all to show that the applicants carries on the business of providing management services. It is the applicant's submission that s. 42(1) of the STA merely states that the Director General of Customs and Excise has the superintendence of all matters relating to the service tax, subject to the direction and control of the Minister. All actions taken by the Director General of Customs and excise under the control of the Minister would still have to be in compliance with the provisions of the STA and s. 42(1) of the STA does not authorise the respondent to act unreasonably or in excess of his powers as set out in the STA.

The issue in this application devolves upon:

(i) the interpretation of s. 7 STA – the enabling provision imposing a liability to service tax (hereinafter referred to as "enabling provision"); and

(ii) a specific chargeability (ie, a "taxable service") within the scope of the enabling provision itself.

"Taxable Services" are exhaustively set out in the schedules of subsidiary legislation passed under the STA. The schedules are consequential provisions within the scope of the enabling provision. For service tax to be chargeable upon the applicants' cost sharing arrangement under its Joint Operating Agreements, the essential statutory requirement under the STA is that the applicants must carry on business of providing taxable service within the scope of enabling provision ie, s. 7 STA. Section 7 STA provides that "subject to this Act, service tax shall be charged on and paid by any person (in this Act referred to as taxable person) who carries on business of providing taxable service referred to in s. 3(a) or selling or providing taxable goods referred to in s. 3(b)". Other provisions of the STA and Service Tax Regulations 1975, P.U.(A) 52/1975, (hereinafter referred to as "STR") provide that taxable persons carrying on business of providing taxable service only pay service tax on certain scheduled "prescribed services" or "taxable services" rendered by them. But not all such "prescribed services" are chargeable to tax. The STR also requires that such "prescribed services" must be provided by or in "prescribed professional establishments" or "prescribed establishments". The schedules to the STR set out exhaustive lists of "prescribed services", "prescribed establishments" and "prescribed professional establishments" which

are chargeable to service tax. In addition, the STA contains a number of administrative and regulatory provisions requiring "taxable persons" to be licensed under s. 8 STA and to be subjected to other mechanical provisions of the STA eg, the obligation to issue invoices under s. 10 STA etc. However, the above provisions are only consequential in nature (such provisions shall hereinafter be referred to a "consequential provisions", for ease of reference). Such provisions are consequential provisions because a person must first be determined to carry on business of providing taxable service under the enabling provision ie, s. 7 STA before reference may be made to the consequential provisions. Accordingly, the consequential provisions do not determine the Applicant's chargeability to tax for they are no more than consequential to the primary issue, or pre-requisite of chargeability.

It is observed that the prescribed services concerning this case are those in item 28 on "provision of all types of management services including project management and project coordination" and the prescribed professional establishment concerned is in item 17, "companies, firms and sole proprietors providing management services, excluding companies, firms and sole proprietors providing management services and having annual sales turnover of less than RM300,000 of prescribed services". Based on the above, it is clear that in order to be subject to service tax under STA, a person has to be carrying on the business of providing the taxable service concerned. In the instant case, the applicants would only be subject to service tax if the applicants carry on the business of providing management services. Therefore the sole question for the determination of this court is whether or not the applicants carry on the business of providing taxable service for the purposes of the STA within the scope of the enabling provision ie, s. 7 STA. It is the contention of the applicants that the applicants are not carrying on the business of providing management services and as such should not be subject to service tax in providing services under Product Sharing Contracts. Factual support for the above contention is that the applicants were in the business of exploration and production of crude oil and natural gas, the refining of crude oil and the manufacture of petroleum products and not in the business of providing management services. Reference was made to the Applicants' Memorandum of Association, namely exhs. "GG9" and "GG10" whereby the main objects of the applicants solely relate to the oil business. Exhibits "GG11" and "GG12" which contain the Directors' Reports for the first applicant since the introduction of management service as a taxable service in 1997 clearly show that the principal activities of the first applicant relate to the exploration and production of crude oil and natural gas, the refining of crude oil until this activity was transferred to its subsidiary company, Lutong Refining Company Sdn. Bhd. and the manufacture of petroleum products. In exh. "G1", the chairman of the applicants (hereinafter referred to as "the chairman") had

explained that under a Production Sharing Contract environment, management services and project management are provided by the applicants and project coordination services are rendered to another Production Sharing Contractor under cost reduction and efficiency initiatives. In exh. "GG3", the chairman further explained that after signing a Production Sharing Contract, the joint venture partners would also sign a Joint Operating Agreement which sets out the rights and obligations of the parties. The joint venture partners of a Production Sharing Contract would agree amongst themselves as to the services required by them and where the services are provided by the applicants as operators of Production Sharing Contracts, the cost of those services are shared between the Production Sharing Contractors on a "no profit no loss" basis and without any mark-up or profit levied at any time. It is the applicants' contention that any management services provided by the applicants under a Production Sharing Contract to the other joint venture partners were merely incidental to the applicants business of exploring and producing crude oil and natural gas. The applicants were not in the business of providing management services. As clearly set out in exh. "GG1", the applicants only provide management services to fellow joint venture partners of a Production Sharing Contract and related upstream companies. The applicants do not provide management services to any other third party not in the above categories. In arts 8.1(b), 8.1.1, 8.1.2, 8.1.4 of exh. "GG13" at pp. 142 to 144 of the applicants' affidavit in reply, it is clearly shown that a Production Sharing Contract provides for all costs for expenditure expended in relation to "Petroleum Operations" in respect of "Crude Oil" under the contract to be recovered. The same concept of sharing costs between joint venture partners is also reflected in the Joint Operating Agreement and art. 7.1 of exh. "GG14" at p. 239 of the applicants' affidavit in reply states:

> 7.1 SHARING OF COSTS
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> Except as otherwise provided in this Agreement, all costs and expenses, direct or indirect, of whatsoever kind and nature incurred by the operator in the performance of or in connection with this Agreement and the Contract, shall be borne and paid by the Parties in proportion to their respective Participating Interests.

The crux of this case turns on the interpretation of s. 7 of STA and in particular the meaning of the phrase, "carries on business" within the meaning of the enabling provision. The meaning of the word "business" and the phrase "carries on business" have been considered in various Malaysian cases with the most recent one being the decision of Ian HC Chin J in *Dewan Perniagaan Bumiputra Sabah v. Ketua Pengarah Hasil Dalam Negeri* [1996] 1 BLJ 397. In the *Dewan Perniagaan Bumiputra Sabah* case, the issue was whether a "grant" received from the Sabah Government was taxable as income under s. 4(a) of the Income Tax Act 1967 and in the course of the case, the learned

judge considered the meaning of "business" or carrying on business". It was held by the learned judge at p. 412

> An essential element of a business or a trade within the meaning of the Income Tax Act, 1967, is the expectation of a profit by the party involved in it (*Lower Perak Co-operative Housing Sociely* [1993] 3 CLJ 1, 21).

In an earlier Malaysian case also involving the Income Tax Act 1967, the Privy Council on a tax appeal from the Federal Court of Malaysia had to consider what amounted to income from a source consisting of a business pursuant to the Income Tax Act 1967. That was the case of *American Leaf Blending Co. Sdn. Bhd. v. Director General of Inland Revenue* [1979] 1 MLJ 1 at p. 3 where the Privy Council said:

> In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordships' view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets *prima facie* amounts to the carrying on of a business. Where the gainful use to which a company's property is put is letting it out for rent, their Lordships do not find it easy to envisage circumstances that are likely to arise in practice which would displace the *prima facie* inference that in doing so it was carrying on a business.

It is observed that in both cases involving a taxing statute just like in the instant case, the emphasis is on the expectation or purpose of making profits as being the main factor in deciding whether a company is carrying on business. The meaning of business was also considered in the Federal Court decision in the case of *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1981] 2 MLJ 230. The *Abdul Ghani* case dealt with the offense of committing corrupt practice and one issue that was considered was whether the accused was "engaged in business". The learned judge at the High Court stage stated at p. 237:

> I have not been able to find the word "business" being defined in any judgment relating to an offence or corrupt practice. In *Harris v. Amery* it was said to have a more extensive meaning than trade. In *Smith v. Anderson* Jessel MR said "anything which occupied the time and attention and labour of man for the purpose of profit, is business". According to *Halsbury's Laws of England*, 3rd edn, vol. 38, 10, 11 ""Business" is a wider term than, and not synonymous with trade: and means practically anything which is an occupation as distinguished from a pleasure. Profit or the intention to make profit is not an essential part of the legal definition of a trade or business; and payment or profit does not constitute a trade or business that which would not otherwise be such." Again, in *Rolls v. Miller* at p. 88 Lindley LJ said:

> The word 'business means almost anything which is an occupation, is distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business.

In *Re Griffin, Ex p Board of Trade*, Lord Esther M.R. said at p. 237:

> Whether one or two transactions make a business depends upon the circumstances of each case. I take the test to be this: if an isolated transaction which if repeated would be a transaction in business, is proved to have been undertaken with the intent that it should be the first of several transactions, that is, with the intent of earning on a business, then it is a first transaction in an existing business. The business exists from the time of the commencement of that transaction with the intent that it should be one of a series.

> I am abundantly satisfied from the above that by his undertaking to obtain the land in return for the issue of shares and the promise to form a company for the hatchery project he had begun an engagement in a 'business'.

Jessel M.R. stated in *Smith v. Anderson* [1880] CA Vol. XV 247 at pp. 258, 259-260 (considered in *Abdul Ghani*'s case):

> Then taking the last edition of the *Imperial Dictionary*, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: "business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement". That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification.
>
> ....
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> Now, knowing what "business" means, is there any distinction between a person carrying on any other business which has for its object the acquisition of gain, and the words "formed for the purpose of the acquisition of gain"? It must be a business to acquire gain, and really the words add nothing to it. "Formed for the purpose of gain," as I put it in *Sykes v. Beadon*, is the same thing. You cannot acquire gain by means of a company except by carrying on some business or other, and I have no doubt if anyone formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained.

Another English case which considered the definition of "business" was *Rolls v. Miller* 27 Ch 71. In *Rolls v. Miller*, the question was whether a charitable institution providing board and lodging for working girls in a house had contravened a covenant of the lease of the house which prohibited any trade or business of any description from being carried on in the house without the consent of the lessor. In construing the meaning of the word, "business", the High Court judge at p. 77 considered the case of *Doe v. Keeling* and concluded from that case that:

> In the first place, that "business" means something other than "trade;" in the second place, that whether or not it is a business, certain *inidicia* are given here; the one is that all the public, and, of course, as far as the school goes, the boys, are the public, speaking generally, the public are invited to go; ...

The learned judge further held at p. 79:

> ... and if I were to add anything to the unsuccessful attempt I formerly made to define "business," I should say that is a business which is carried on by any person in addition to, and diverse from, his ordinary domestic life, and this, to my mind, is something which is carried on by the society not being ordinary domestic life at all, being a business for which they solicit subscriptions, and which they carry on by means of those subscriptions.

This case went up before the Court of Appeal and in construing the question of whether they are doing business, Cotton LJ held at p. 85:

> I cannot read the two words "trade" and "business" as synonymous. They may be a great many businesses which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit – whether profit is actually obtained or not, must of course be immaterial – is certainly material in considering whether what was being done is, or is not, a business, yet, in my opinion, it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances, does not necessarily make a thing a business which if there was no payment would not be a business.

In the instant case, not only were the services render to other joint venture partners under a Profit Sharing Contract without any profit motive, they were specifically one rendered to joint venture partners of a Product Sharing Contract and were not rendered to the public.

Another helpful case is the English case of *A. Lewis and Company (Westminster), Limited v. Bell Property Trust, Limited* [1940] 1 Ch 345. In this case, a tea-shop in the course of its business sold cigarettes and the question was whether that was in breach of covenant in the lease that the premises could not be used for the business of the sale of tobacco, cigar and cigarettes. The High Court judge held at p. 173:

> I find it difficult to take the view that anybody being asked this question: What is the business which the A.B.C. carry on at this shop? would reply: They carry on several businesses; they carry on the business of selling refreshments, they carry on the business of selling confectionery, they carry on the business of selling tobacco, cigars and cigarettes.

> In my view, what is done at these premises is the carrying on of the business of a tea-shop, and that involves, among other things, the sale of cigarettes. It is common – indeed, I was told that it was almost universal – that in tea-shops of this character cigarettes should be sold. Accordingly, it appears to me that it is no more right to predicate of this shop that there is carried on there the business of the sale of tobacco, cigars and cigarettes than to say of it that there is carried on the business of the sale of milk, or the business of the sale of confectionery. There is there carried on the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold.

The High Court judge subsequently added at p. 176:

> The tea-shop does not carry on the business of a tobacconist or the business of selling tobacco, cigars, or cigarettes because, as part of its business, it sells cigarettes, any more than it carries on, in ordinary parlance, the business of a retailer of milk because, in the course of its business, it sells milk, either in glasses or as an ingredient of a cup of tea.

The above principle would specifically cover the situation in the instant case. As stated in para. 14 of the applicants' affidavit in reply, the applicants merely provide incidental management services so that similarly to what was held in the *Lewis & Co.* case. I therefore conclude in the circumstances that the applicants are not carrying on the business of providing management services. Management services provided under a Product Sharing Contract to joint venture partners are incidental or in the course of the applicants' business which is the exploration and production of crude oil and natural gas.

Another relevant Malaysian case is *Arab Malaysian Finance Berhad v. Meridien International Credit Corporation Ltd. London* [1993] 4 CLJ 307 p. 314. It was held by the Supreme Court at p. 314:

> In view of the welter of authorities on what constitutes business and what is the correct interpretation of the expression "carrying on business" it would be necessary to consider the objects for which the appellant company was incorporated.

In considering the objects of the appellant, the Supreme Court at p. 3073 followed the decision of the Court of Appeal where Lindley LJ observed:

> ... The first question we have to consider is, what is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing

> something else, however general the words are. Taking that as the governing principle, it appears to me plain beyond all reasonable dispute that the real object of this case, which, by the by is called the German Date Coffee Company, Limited was to manufacture a substitute for coffee in Germany under a patent, valid according to German law. It is what the company was formed for, and all the rest is subordinate to that. The words are general, but that is the thing for which the people subscribe their money.

Another English case, *Stephens v. Mysore Reefs (Kangundy) Mining Company Limited* [1902] 1 Ch 745 was quoted in the decision of the Supreme Court in the *Arab Malaysian Finance* case and the *Stephen* case applied the judgment of Lindley LJ quoted above. At p. 316 the Supreme Court further stated:

> Swinfen Eady J took the first paragraph as stating the principle or primary object for which the company was formed while the remaining paragraphs to be read as conferring on the company full and ample powers for carrying out that main object. He came to the conclusion that the proposed scheme was not authorised by the memorandum, and therefore allowed the application. The passage of his judgment at p. 749 indicated clearly his line of reasoning:
>
> > In my opinion, the right to construe the memorandum of association is to take the first paragraph of Clause 3, as stating the principal or primary object for which the company is formed, ie, 'to acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy), Limited'. Then the remaining paragraphs of Clause 3 must be read as conferring on the company full and ample powers for carrying out the main object. It is right to give a liberal construction to these subsidiary paragraphs to enable the main object of the company to be carried out. But is not right to accept a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever. I think I am precluded from so wide a construction, not only by the general principles of construction, but by the several authorities cited by counsel for the plaintiff, and particularly by Lindley LJ's judgment in the case of *In Re German Date Coffee Co.* ...

Besides applying the above approach to determine the appeal in the *Arab Malaysian Finance Berhad* case, the Supreme Court also considered the meaning of the words, "carrying on business". The Supreme Court followed the decision in *Smith v. Anderson* [1880] 15 Ch D 247 and the judgment of Jessel M.R. as quoted earlier in the definition of "business" and continued at p. 318:

> Applying the meaning of business to the instant case and based on whatever facts available before us, we come to the only conclusion anyone could come to under the circumstances that it is beyond agreement, the issuance of a guarantee on a particular or any occasion per se could not be regarded as a business. Besides, we were not informed of the circumstances under with the

> said guarantee was granted by the appellant company in view of the procedure taken by the parties to these proceedings and neither was it divulged in the High Court, judging from the remarks of the learned judge in his judgment at p. 29 of the record of appeal.
>
> Therefore, there was no disclosure in what manner, if the issuance of a guarantee was regarded as a business, a profit would be derived therefrom as no businessman in his right sense would embark on a business, knowing that it would not be profitable to do so, profit being the ultimate objective of all businessmen. Indeed, the counsel for the appellant company himself conceded that the appellant company received neither benefit nor income from the issuance of the guarantee.

Applying the above principles to the instant case, in exh. "GG9", first paragraph of cl. 3, just like in the *Stephens* case, the first applicant is established:

> to acquire and take over as a going concern the business now carried on by the Anglo-Saxon Petroleum Company Limited, ...

Where the second applicant is concerned, like the *German Date Coffee Company* case, the name of the company also indicates its business and it is known as Sabah Shell Petroleum Company Limited. As stated in the first paragraph of cl. 3 of exh. "GG10" the second applicant is established:

> To carry on in all their respective branches the businesses of producing, refining, storing, transporting supplying, selling, dealing in and distributing petroleum and other oils and any products thereof.

The conclusion at which I arrive is that the applicants are in the petroleum business, which was embarked upon to derive profit. They are not carrying on the business of providing management services within the scope of the enabling provision ie, s. 7 STA. The respondent has not adduced any evidence to support his contention that the applicants are carrying on business of providing management services except for making bare averments to that effect (see para. 8 of the respondent's affidavit). The respondent confirmed in para. 8 of their affidavit that provision of management services is one of the functions and activities of the applicants but as clearly shown in the *A. Lewis and Co.* case, the carrying on of a specific business may involve some other activity in the course or as part of its business but that does not mean a company is carrying on a business of doing that other activity. Similarly the applicants are in the oil business and in the course of their business may provide management services but that does not mean they are in the business of providing management services. The respondent further refers to fact that management services are supplied to a partner or company in the same group

which is a separate entity hence the services are subject to service tax in para. 14 of the respondent's affidavit but the fact that another entity is involved is not relevant to the determination of whether the applicants are in the business of providing management services which is the essential requirement under s. 7 of STA before service tax can be imposed. From the cases quoted above, it has been shown that the four relevant factors in determining whether a company is carrying on a particular business for the purposes of triggering the application of the enabling provision are:

(i) profit motive;

(ii) services provided to the public;

(iii) activities which are part or in the course of a business constitute separate businesses;

(iv) principal or primary object for which the companies was formed as set out in the memorandum of association.

The respondent cannot come to this court to seek judicial intervention on its behalf to read words into the STA which our Parliament has deliberately avoided. Service tax is not, and neither can the STA be read as, a tax on every conceivable activity carried on by a legal entity. To read the STA in such an unauthorized manner would result in treating the words "carries on business of providing taxable services" as mere surplussage, in itself a violation of the canons of construction. It is clear that the STA creates a restrictive charge to tax by way of an exclusionary scope of tax whilst UK VAT legislation creates a broader charge to tax by way of an inclusionary scope of tax. This would be readily appreciated by a simple comparison of the different enabling provisions. Section 7 of the STA at the material time provides:

> Subject to this Act, service tax shall be charted on and paid by any person (in this Act referred to as taxable person) who carries on business of providing taxable service referred to in Section 3(a) or selling or providing taxable goods referred to in Section 3(b).

The specific language of UK VAT legislation past and present is as follows:

> THE FINANCE ACT 1972 (C.41)
>
> PART 1 – VALUE ADDED TAX
>
> SECTION 2 – SCOPE OF TAX
>
> (1) Except as otherwise provided by this Part of this Act the tax shall be charged and payable as follows.

(2) Tax on the supply of goods or services shall be charged only where:

(a) the supply is a taxable supply; and

(b) the goods or services are supplied by a taxable person in the course of a business carried on by him;

and shall be payable by the person supplying the goods and services.

(3) Tax on the importation of goods shall be charged and payable as if it were a duty of customs.

(4) Any reference in the following provisions of this part of this Act to the supply by any person of goods or services is a reference to such a supply in the United Kingdom in the course of business carried on by him.

VALUE ADDED TAX 1994 (C.23)

PART 1 – THE CHARGE TO TAX

SECTION 4 – SCOPE OF VAT ON TAXABLE SUPPLIES

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

Therefore the UK authorities cited by the respondent turns on the very specific provisions of the UK VAT enactment. Additionally, the UK Act specifically provides a statutory definition of the word "business" *viz*:

94 Meaning of 'business' etc.

(1) In this Act, 'business' includes any trade, profession or vocation.

(2) Without prejudice to the generality of anything else in this Act, the following are deemed to be the carrying on of a business:

(a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members; and

(b) the admission, for a consideration, of persons to any premises;

(3) ...

(4) Where a person, in the course or furtherance of a trade, profession or vocation, accepts any office, services supplied by him as the holder of that office are treated as supplied in the course or furtherance of the trade, profession or vocation.

(5) Anything done in connection with the termination or intended termination of a business is treated as being done in the course or furtherance of that business.

(6) The disposition or of its assets or liabilities (whether or not in connection with its reorganisation or winding up), is a supply made in the course or furtherance of the business.

Below are three decided cases on the meaning of "in the course or furtherance or business" under UK VAT legislation which are quite instructive in considering the instant case at hand"

(1) *Morrison's Academy's Case* [1978] STC 1

> From what we have said so far it will be seen that the test which is critical in determining whether 'taxable supplies' of goods or services are within the scope of the value added tax is whether they were made 'in the course of a business carried on' by a 'taxable person'. 'Business' is, however, not exhaustively defined and for the purposes of this appeal s. 45 of the 1972 Act gives little help for it merely provides that 'business' includes any trade, profession or vocation. The problem for the tribunal, accordingly, was one of interpretation of s. 2(2)(b) of the 1972 Act in the context in which it appears in the Act and they resolved that problem by holding that the word 'business' for the purposes of that subsection connotes the carrying on by the taxable person of activities of a commercial nature having as their object the pursuit of profit or gain. In so interpreting s. 2(2) the tribunal followed all the earlier decisions of the tribunal elsewhere in Britain in cases in which the construction of the subsection was in issue. On their finding that the association does not seek to make profits the reason for the decision reached by the tribunal was that they did not consider that there was any commercial element in the association's activities.
>
> ...
>
> The proper approach to the interpretation of s. 2(2)(b) of the 1972 Act is to give the words used their natural meaning unless the context otherwise requires. On this approach the natural meaning of the word 'business' is wide enough to include the deliberate carrying on, continuously, of an activity or activities, or an occupation or profession.

(2) *Lord Fisher*'s case [1981] STC 238

> It is thus clear that a supply of services, made for a consideration within s. 5(8) of the UK VAT Act, is not a taxable supply unless it is supplied by a taxable person 'in the course of a business carried on by him'. It is with the meaning in law of this phrase that this case has been concerned with.

(3) *Royal Exchange Theatre Trust Case* [1979] STC 728

> There is no doubt that under the UK VAT Act even gifts may be made in the course of a business; indeed there is a specific provision in s. 5(2) of the 1972 Act to include the making of a gift within the scope of the supply of goods.

In gist I am of the view that any attempt to refer to VAT legislation is false as:

(i) Our STA is worded very differently:

(ii) VAT and service tax are conceptually and schematically different:

(a) VAT applies to all supplies of services and goods "in the course or furtherance of all business", unless exempted; whereas the reverse is true of our Service Tax ie, service tax does not apply unless the person is in the specific business of running a prescribed establishment which provides prescribed services;

(b) Unlike VAT, service tax cannot apply to component activities of a business. Service tax can only apply where a specific business of providing taxable or prescribed services is carried on.

I think s. 7 of the STA is clear and unambiguous. However, what the respondent is attempting to do by imposing and inflicting the words a UK enactment into our STA is to give a different interpretation to the very words of s. 7 of the STA. The effect therefore, as being alleged by the respondent, is that there is a legal ambiguity in s. 7 in that it is capable of two or more interpretations.

In this regard the law construes an ambiguity in favour of the taxpayer. Words give rise to ambiguity in the legal sense if the words are "open to diverse interpretation" ie, capable of two alternative meanings. In this event, the construction most favourable to the taxpayer should be adopted. In *National Land Finance Cooperative v. Director General of Inland Revenue* [1993] 4 CLJ 339, at 344 the Supreme Court said:

> It was the Revenue's submission that the intention to make the amendment retrospective was in clear terms and therefore valid.
>
> The are ample authorities to show that the courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Mickewait* [1855] 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. IRC, supra*:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

It has also been said by the Judicial Committee in *Oriental Bank Corporation v. Wright* [1880] 5 AC 842, 856:

> that the intention to impose a charge upon a subject must be shown by clear and unambiguous language.

To refer to the oft-cited rules of interpretation in the words of Lord Donovan in *Mangin v. IRC* [1971] AC 739:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices ... moral percepts are not applicable to the interpretation of revenue statutes.
>
> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' Per Rowlatt J in *Cape Brandy Syndicate v. IRC* 12 TC 358.
>
> Thirdly, the object of the construction of a statute being to ascertain the will of legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to construction.

On the last point, namely, "the history of an enactment and the reasons which led to its being passed may be used as an aid to construction". It is observed that Parliamentary material has hitherto been excluded as an agent of construction of statutes. This view has been radically departed from by the decision of the *Pepper (Inspector of Taxes) v. Hart and related appeals* [1992] STC 898 where Lord Browne-Wilkinson summaries the now accepted approach in the following words at p. 923:

> I therefore reach the conclusion, subject to any question of parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where:
>
> (a) legislation is ambiguous or obscure, or leads to an absurdity;

(b) the material relied on consists of one more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect;

(c) the statements relied on are clear.

On the mater of ambiguity Lord Browne-Wilkinson stated at p. 918:

> Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction. In many, I suspect most, cases references to parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?

To place the facts and the law in the context of the instant appeal and in particular reference to the development of the rules of interpretation, it is appropriate to quote at length the words in the judgment of Edgar Joseph Jr. FCJ in *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 4 CLJ 285 where he states:

> However, in the landmark decision of *Pepper v. Hart*, the House of Lords, by a majority of 6 to 1 (Lord Mackay LC dissenting) held that subject to any question of Parliamentary privilege, the exclusionary rule should be relaxed in certain circumstances. What these circumstances are, appear sufficiently from the leading speech of the House delivered by Lord Browne-Wilkinson [1993] 1 All ER 42 at p. 64: [1992] 3 WLR 1032 at p. 1056A-C):
>
> > My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria.

In three subsequent cases which followed closely on the heels of *Pepper v. Hart* – namely *R.V. Warwickshire County Council ex p. Johnson* [1993] 2 WLR 1; *Stubbings v. Webb* [1993] 2 WLR 120 and *Foster v. Chief Adjudication Officer* [1993] 2 WLR 292 – the House of Lords referred to Hansard as an aid to statutory construction. It is observed that in Singapore, the courts have followed the majority judgment in *Pepper v. Hart*. (See *Tan Boon Yong v. Controller of Income Tax* [1993] 2 SLR 48, 55, *Raffles City Pted. Ltd. v. A.G.* [1993] 3 SLR 580, 587-88, *Low Kok Wai v. PP* [1994] 1 SLR 676, 684 D-E). Indeed, the rule of *Pepper v. Hart* has now received statutory recognition there in the Interpretation (Amendment) Act 1993. This follows similar amendments made in Australia in 1984 to the Interpretation Act 1901, by the insertion of s. 15 AB which permits reference to Hansard reports as an aid to statutory interpretation. In New Zealand, the rule in *Pepper v. Hart* is followed by the courts, though it has not been placed on a statutory footing. (See Jim Evans on *Statutory Interpretation* 290-291 (OUP, New Zealand 1989).

It is noteworthy from Hansard that in introducing cls. 7 and 8 (later enacted as ss. 7 and 8 of the STA), it was said as follows:

> Cukai itu akan dikenakan ke atas dan dibayar oleh mana-mana orang yang menjalankan perniagaan membekal perkhidmatan bercukai atau yang menjual atau membekalkan barang-barang bercukai di dalam mana-mana pertubuhan yang ditetapkan seperti yang diperuntukkan di bawah **Fasal 7** Rang Undang-Undang itu. Orang itu akan diberi kuasa di bawah Fasal 10(2) untuk mengutip cukai dari pelanggan-pelanggan atau pembeli-pembeli-nya.

Translation

> The tax is chargeable upon and payable by any person who carries on business of providing taxable service or selling or providing taxable goods in a prescribed establishment as provided for under **Clause 7** of the Bill.
>
> Such person is also given the power under Clause 10(2) to collect tax from customers or purchasers.

As can be seen from the above, the promoter uses the phrases "menjalankan perniagaan" and "pelanggan-pelanggan atau pembeli-pembelinya". These words are an outright reference to "carrying on business". Parliamentary confirmation of the clear purpose of the STA may be seen in the report in Hansard to the Service Tax Amendment Act 1999. Apart from the principles of *Pepper*'s case and the Parliamentary clarification s. 17A inserted into the Interpretation Acts 1948 and 1967 that requires a court to consider the purpose of legislation even if such purpose is not expressed in the statute. This coupled with a need to avoid absurdity would fall within the ambit of the decision of the Supreme Court in *Chor Phaik Har*'s case. Apart from s. 7 of the STA, the requirement of carrying on business is entrenched in ss. 8, 9 and 12 of the STA. These sections provide as follows:

(i) Section 8 STA: a licence is required by "every person who carries on business of providing taxable service" and 'no person shall carry on such a business" without a licence.

(ii) Section 9 STA: a person who "ceases to carry on business" must surrender his licence.

(iii) Section 12 STA: regular returns must be filed by reference to the "monthly business account".

Further, although the 1999 Act amends s. 7 STA, Parliament has not seen it fit to remove the references to "carries on business" and "business" from ss. 7, 8, 9 and 12. In fact the Service Tax Amendment Act 1999 (Act A 1060) contains numerous references to the word "business". Therefore to restate the principles of statutory interpretation applicable to tax cases, as well as general principles of interpretation relevant to this particular case, the following should be borne in mind.

(a) there is no room for intendment in tax legislation – one can only look fairly at the language used:

(b) tax cannot be imposed in the absence of clear and unambiguous words;

(c) any ambiguity in the meaning of a statute must be construed in favour of the taxpayer;

(d) the respondent must bring the taxpayer within the letter of the law to impose tax – regardless of however apparently within the spirit of the law the case might otherwise appear to be;

(e) the respondent cannot tax by analogy but by statute; and

(f) it is not the function of the court of law to give to words a strained and unnatural meaning only to apply a taxing section which had the legislature thought of it, would have been covered by appropriate words.

These trite principles of revenue law were applied by the Supreme Court in *National Land Finance Co-operative v. Director General of Inland Revenue* [1993] 4 CLJ 339 at p. 342 Gunn Chit Tuan CJ (Malaya) said:

> Counsel contended that in construing the said amendment certain principles relating to the interpretation of taxing statutes must be followed. First, there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed. (per Rowlatt J in *Cape Brandy Syndicat v. IRC* 12 TC 358). Another principle is that where the meaning of a statute is in doubt the ambiguity must be construed in favour of the subject. Yet another principle is that an exemption from tax cannot be removed except by sufficiently clear words to achieve that purpose.

There are ample authorities to show that the courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* [1844] 11 Exch 452 it was held that a subject was not to be taxed without clear words. I am aware that revenue from taxation is essential to enable Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, I should remind myself of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. IRC, supra*:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

It has also been said by the Judicial Committee in *Oriental Bank Corporation v. Wright* [1880] 5 AC 842, 856:

> that the intention to impose a charge upon a subject must be shown by clear and unambiguous language.

This brings me to the next principle of interpretation ie, that every word in a statute must be given meaning and effect. Statutory language cannot be treated as mere surplusage or a dead letter. In *Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors.* [1985] 1 CLJ 511 at p. 516 Abdoolcader SCJ said:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing into give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. *Quebec Railway, Light, Hear and Power Co. Ltd. v. Vandry*, Lord Sumner in delivering the judgment of the Judicial Committee said (at p. 676):
>
> > Secondly, there is no reason why the usual rule should not apply to this as to other statues-namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.

Malaysian courts have been quick to prevent attempts to read words into taxing statutes to the disadvantage of taxpayers. In this context, the revenue attempted to read the words "necessarily incurred" (present in the applicable Australian legislation) together with the phrase "to the extent to which they are incurred" into the Malaysian Income Tax Act 1967. One such judgment is the case of *Director General of Inland Revenue v. Kok Fai Yin Co. Sdn. Bhd.* (MTKL Rayuan Cukai No. 14-1-90). This case dealt with the apportionment of directors' fees in the absence of express provisions under the s. 33(1) of the ITA, and dealt with the same principles of deductibility as are in issue in the instant case.

In the judgment of the Court Mohd. Eusoff bin Chin J (as he then was) said:

> The main issue is whether the appellant has power to apportion the directors' fees paid by the respondent into allowable and disallowable parts under section 33(1) of the Income Tax Act 1967.
>
> ...
>
> But the function of the appellant like other public bodies, is merely to enforce the law by exercising powers given to it by the law. He should not assume authority or exercise power which is not expressly given to him by the law and if he does so, the exercise of such power is invalid and must be declared illegal.

It is observed that the respondent had acted in excess of his jurisdiction and unreasonably in holding that services provided by the applicants under Product Sharing Contracts were subject to service tax. I am of the view that this is an appropriate case for an order of *certiorari* to quash the decision of the respondent on the principles as established by the Supreme Court in the case of *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1987] 2 CLJ 119 Abdoolcader SCJ said at p. 124:

> In exercising his functions in this regard, the Registrar had an unfettered discretion which was subject to a duty to act responsibly in the *Wednesbury* sense *(Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation)*, that is to say, if a decision-making body comes to its decision on no evidence or comes to an unreasonable finding – so unreasonable that a reasonable person would not have come to it – then the courts will interfere. The *Wednesbury* principle refers in effect, in the words of Lord Diplock in *Bromley London Borough Council v. Greater London Council & Anor*. (at p. 821), to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.

The above decision has since been followed in the later case of *Johnson & Johnson Sdn. Bhd. v. Director General of Customs and Excise* [1994] 3 CLJ 767 where an order of *certiorari* was granted against the Director General of Customs and Excise to quash a notice under the Sales Tax Act 1972. In the *Johnson & Johnson* case, the High Court judge held at p. 771:

> In deciding this problem before me, I follow the classic and illuminating case of *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1987] 1 MLJ 124 and adhere to the judgment of Abdoolcader SCJ when he said although the Registrar (or authority) has an unfettered discretion which was subject to a duty to act responsibly in the *Wednesbury* sense but if the decision-making body comes to its decision on no evidence or comes to an unreasonable finding so unreasonable that a reasonable person would not have come to it – then the Courts will interfere.

The "*Wednesbury* principle" has since been applied and expanded by the Supreme Court in the case of *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd. Noh* [1997] 2 CLJ 11. In the *Kumpulan Perangsang* case, it was decided that when a decision was challenged on the grounds of "*Wednesbury* unreasonableness", the court is not confined to an examination of the decision-making process but could examine the merits of the decision itself. As stated by Gopal Sri Ram JCA at p. 25:

> An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in *certiorari* proceedings.

Applying the above principles to the instant case, I am of the opinion that there is no evidence adduced and no basis whatever to hold that the applicants are carrying on the business of providing management services within the scope of the enabling provision. As service tax is only charged on and payable by a person carrying on the business of providing taxable service – (management services in the instant case), the respondent had acted in excess of his jurisdiction and unreasonably in accordance with the "*Wednesbury* principle" in deciding that the applicants were subject to service tax in rendering services under Production Sharing Contracts. The enabling provision ie, s. 7 of the STA, only operates where there is a distinct business of providing taxable service and not where the "service" is a component feature of some other business eg, the oil and gas business. To be eligible for service tax, a person must "carry on a business of providing those services", which then becomes taxable if they are so prescribed subsequently. Business ordinarily contemplates profits, and notwithstanding the risks and likely losses attendant thereon service tax would nevertheless be payable if it is shown that the taxable person was "carrying on the business of providing those services". In regard to the applicants' activities, the respondent has unlawfully disregarded the express words of s. 7 of the STA. The respondent has misdirected itself by relying on the words of UK tax legislation, particularly those relating to "activities in the course of business", to interpret a totally different concept and scheme of taxation on services in Malaysia. The contrived interpretation of the respondent suggestive of a latent legal ambiguity is smartly put to rest by the principle in *Pepper*'s case and the Parliamentary affirmation in this regard. On the basis of the foregoing, I hereby allow for order in terms of the application.